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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

KALMAN ISAACS, on behalf of himself and  
all others similarly situated,

Plaintiff,

v.

ELON MUSK and TESLA, INC.,

Defendants.

Case No. 3:18-cv-04865-EMC

**CLASS ACTION**

**REPLY MEMORANDUM OF LAW IN  
FURTHER SUPPORT OF THE MOTION  
OF THE TESLA INVESTOR GROUP  
FOR CONSOLIDATION,  
APPOINTMENT AS LEAD PLAINTIFF  
AND APPROVAL OF SELECTION OF  
LEAD COUNSEL; AND IN OPPOSITION  
TO COMPETING MOTIONS**

Date: November 15, 2018  
Time: 1:30 p.m.  
Courtroom: 5 – 17th Floor  
Judge: Hon. Edward M. Chen

(caption continues on the following pages)

1 WILLIAM CHAMBERLAIN, Individually  
2 and on Behalf of All Others Similarly Situated,

3 Plaintiff,

4 v.

5 TESLA INC., and ELON MUSK,

6 Defendants.

Case No. 3:18-cv-04876-EMC

7 JOHN YEAGER, Individually and on Behalf  
8 of All Others Similarly Situated,

9 Plaintiff,

10 v.

11 TESLA, INC. and ELON MUSK,

12 Defendants.

Case No. 3:18-cv-04912-EMC

13 CARLOS MAIA, Individually and on Behalf  
14 of All Others Similarly Situated,

15 Plaintiff,

16 v.

17 TESLA, INC. and ELON R. MUSK,

18 Defendants.

Case No. 3:18-cv-04939-EMC

19 KEWAL DUA, Individually and on Behalf of  
20 All Others Similarly Situated,

21 Plaintiff,

22 v.

23 TESLA, INC. and ELON MUSK,

24 Defendants.

Case No. 3:18-cv-04948-EMC

25 *(caption continues on the following page)*  
26  
27  
28

JOSHUA HORWITZ, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

TESLA INC., and ELON R. MUSK,

Defendants.

Case No. 3:18-cv-05258-EMC

ANDREW E. LEFT, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

TESLA INC., and ELON R. MUSK,

Defendants.

Case No. 3:18-cv-05463-EMC

ZHI XING FAN, Individually and on Behalf of  
All Others Similarly Situated,

Plaintiff,

v.

TESLA INC., and ELON R. MUSK,

Defendants.

Case No. 4:18-cv-05470-EMC

SHAHRAM SODEIFI, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

TESLA, INC., a Delaware corporation, and  
ELON R. MUSK, an individual,

Defendants.

Case No. 3:18-cv-05899-EMC

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**PRELIMINARY STATEMENT**

The Tesla Investor Group is the Court’s best choice for lead plaintiff.<sup>1</sup> No other movant presents the Group’s combination of size, adequacy, typicality, and diversification—a combination that will be critical to maximizing recovery for the entire class given the unique circumstances of this case. Other movants’ lawyer-driven arguments that attack the adequacy of groups are counter to the plain text of the Private Securities Litigation Reform Act of 1995 (the “PSLRA”) and case law interpreting it. Moreover, many movants miscalculate and overstate their own losses and suffer from unique defenses that render them poor candidates to lead this litigation. For the reasons discussed below, the Tesla Investor Group should be appointed lead plaintiff, its selection of counsel should be approved, and the competing motions should be denied.

**ARGUMENT**

**I. THE TESLA INVESTOR GROUP IS THE MOST ADEQUATE PLAINTIFF IN THIS LITIGATION**

**A. The PSLRA Expressly Contemplates Groups as Lead Plaintiff**

Several movants—and even the Defendants themselves—self-servingly argue that a group cannot be appointed as lead plaintiff. The Court need not look beyond the PSLRA itself to reject that false assertion. The PSLRA expressly requires the Court to “appoint as lead plaintiff” the “member *or members*” of the class that meet the statutory requirements; the “person *or group of persons*” with the biggest financial stake and that satisfies Rule 23 is entitled to a rebuttable presumption of being the most adequate plaintiff. 15 U.S.C. § 78u4(a)(3)(B)(i), (iii) (emphases added). Absent statutory ambiguity, “the sole function of the courts . . . is to enforce the statute according to its terms.” *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Unions Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). The PSLRA is no exception, and courts cannot invoke judicial policy preferences as a means of

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<sup>1</sup> Capitalized terms are defined in the Tesla Investor Group’s moving and opposition memoranda unless otherwise indicated. ECF Nos. 47, 108.

1 sidestepping unambiguous statutory text. *See In re Cavanaugh*, 306 F.3d 726, 729–31 (9th Cir.  
2 2002); *In re Baan Co. Sec. Litig.*, 186 F.R.D. 214, 216 (D.D.C. 1999).

3 Accordingly, any contentions about Tesla Investor Group members’ lack of pre-litigation  
4 relationships are justified only to the extent they bear on the Group’s adequacy pursuant to Rule  
5 23. Any lead plaintiff—whether a group or an individual—is inadequate to protect the interests  
6 of the class if subservient to counsel. But that legitimate concern carries no weight here, and no  
7 opposition brief proves otherwise.<sup>2</sup> Defendants and competing movants cannot rebut the  
8 undisputed facts that: (1) the Tesla Investor Group was formed after one of its *members*  
9 suggested a combination of varied investors to best represent the class; (2) every member of the  
10 Group is a sophisticated institutional or high-net-worth investor with decades of financial  
11 experience; and (3) the Group’s *members* agreed upon litigation-management procedures to  
12 maximize recovery for the class. *See* Joint Declaration of the Tesla Investor Group (ECF No.  
13 51-4); Supplemental Joint Declaration of the Tesla Investor Group, Wagstaffe Decl., Ex. A. The  
14 Group’s joint declarations confirm these facts and that the Group will adequately represent the  
15 class.<sup>3</sup> It strains credulity to suggest that the sophisticated members of the Tesla Investor Group  
16

17  
18 <sup>2</sup> The Tesla Investor Group consists of sophisticated investors who have set forth a plan for  
19 jointly overseeing this litigation. That distinguishes the Group from those in cases cited by  
20 David and Bridgestone, which involved large groups that failed to establish their cohesiveness.  
21 *See, e.g., Ross v. Abercrombie & Fitch Co.*, No. 05-cv-819, 2007 WL 895073, at \*2, \*4 (S.D.  
22 Ohio Mar. 22, 2007) (where four individuals failed to submit “any type of joint affidavit or  
23 declaration from the group members concerning their cohesiveness,” there “was no basis from  
24 which to ascertain the ability of the” group or its members “to fairly and adequately represent the  
25 interests of the class”); *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1153–54 (N.D.  
26 Cal. 1999) (where “groups as large as 4,000 plaintiffs strong [were] vying for appointment,” the  
27 court expressed concerns over “assembling groups of litigants that will find it difficult to  
28 coordinate their supervision of the representation”).

<sup>3</sup> *See In re Bank of Am. Corp. Auction Rate Sec. Mktg. Litig.*, No. MDL 09-02014 JSW,  
2009 WL 2710413, at \*3 (N.D. Cal. Aug. 26, 2009). Indeed, when courts in this Circuit have  
evaluated proposed lead plaintiff groups, they have routinely approved small groups such as the  
Tesla Investor Group upon a showing of cohesion based on a joint declaration that addresses  
procedures for communication, decision-making, and managing the litigation, as well as an  
understanding of the responsibilities of lead plaintiff and a demonstrated enthusiasm for  
achieving optimal results for the class. *See, e.g., McCracken v. Edwards Lifesciences Corp.*, No.  
813CV1463JLSRNBX, 2014 WL 12694135, at \*4 (C.D. Cal. Jan. 8, 2014); *Bruce v. Suntech*  
*Power Holdings Co.*, No. CV 12-04061 RS, 2012 WL 5927985, at \*2–3 (N.D. Cal. Nov. 13,  
2012); *Hodges v. Akeena Solar, Inc.*, 263 F.R.D. 528, 533 (N.D. Cal. 2009); *Perrin v. Sw. Water*  
*Co.*, No. 208CV7844FMCAGR, 2009 WL 10654690, at \*3 (C.D. Cal. Feb. 13, 2009).

are controlled by their chosen counsel. That an iconic investor such as Andrew Left or a hedge fund such as Vilas Capital would bend to their lawyers' will is too extravagant to be taken seriously. The members of the Tesla Investor Group have been, and will be, the driving force in this case.

This Court and countless others routinely appoint investor groups such as the Tesla Investor Group as lead plaintiff pursuant to the PSLRA. *See Bruce*, 2012 WL 5927985, at \*2 (appointing a group as lead plaintiff, noting "[t]his is a small and cohesive group, in accordance with the PSLRA's goal of having an engaged lead plaintiff").<sup>4</sup> If that argument sounds familiar to other movants' counsel, it should: each firm attacking the propriety of appointing a group in this case has *successfully* moved for appointment of a group as lead plaintiff in prior cases.<sup>5</sup> The only lawyer-driven concern here is opposing counsel's extra-textual, meritless attack on the Tesla Investor Group.

Not only does the PSLRA expressly authorize groups to serve as lead plaintiff, but empirical evidence suggests that groups achieve superior results—and groups such as the Tesla Investor Group that include at least one financial institution perform better still:

[O]ur data supports the view that *groups perform better than individuals as lead plaintiffs in larger cases*, while groups that include an entity yield larger settlements and greater provable loss ratios than those that occur with mere aggregation of individuals. These are among the most surprising findings of our study because most commentators (ourselves included) have cast a skeptical eye toward aggregation as a means of finding the most adequate plaintiff. However,

<sup>4</sup> *See also, e.g., Robb v. Fitbit, Inc.*, No. 16-cv-00151-SI, 2016 WL 2654351, at \*4–7 (N.D. Cal. May 10, 2016) (appointing the unrelated investors in the "Fitbit Investor Group" as lead plaintiff); *Johnson v. OCZ Tech. Grp., Inc.*, No. CV 12-05265 RS, 2013 WL 75774, at \*3 (N.D. Cal. Jan. 4, 2013) ("Small, cohesive groups similar to the OCZ Investor Group are routinely appointed as Lead Plaintiff in securities actions when they have shown their ability to manage the litigation effectively in the interests of the class without undue influence of counsel."); *Perrin*, 2009 WL 10654690, at \*3 (finding a group of four plaintiffs "not so large as to be unwieldy or unmanageable").

<sup>5</sup> *See, e.g., Emerson v. Genoea Biosciences, Inc.*, No. 17-12137-PBS, 2018 WL 839382 (D. Mass. Feb. 12, 2018) (Levi & Korsinsky; five-member group); *Porzio v. Overseas Shipholding Grp.*, No. 12 CIV. 7948, 2013 WL 407678 (S.D.N.Y. Feb. 1, 2013) (Robbins Geller; three-member group); *Bang v. Acura Pharm., Inc.*, No. 10 C 5757, 2011 WL 91099 (N.D. Ill. Jan. 11, 2011) (Kahn Swick; three-member group); *In re Charles Schwab Sec. Litig.*, No. C 08-01510 WHA, 2008 WL 2635495 (N.D. Cal. July 3, 2008) (Hagens Berman; six-member group); *Barnet v. Elan Corp., Pub. Ltd. Co.*, 236 F.R.D. 158 (S.D.N.Y. 2005) (Entwistle & Cappucci co-lead counsel; six-member group).

our earlier supposition that a group would perform worse than an individual is not borne out by our settlement size and provable loss data.<sup>6</sup>

Perhaps those “surprising findings” are why Defendants themselves have taken the unusual step of opposing a group appointment. *See* ECF No. 105, at 1–2.

**B. Only the Tesla Investor Group Provides the Necessary Diversification to Adequately Represent the Class**

The Tesla Investor Group offers the broadest spectrum of representation for a class that encompasses multiple Tesla securities, trading strategies, and transactions that occurred throughout the relevant class period. No other movant purports to be as inclusive.

The class consists of all injured purchasers and sellers of Tesla securities between August 7, 2018 and August 17, 2018, both inclusive. Defendants complain that lumping purchasers and sellers together “makes no sense.” *Id.* at 2. That is false. The proposed class definition is designed to represent *all* those harmed by Defendants’ misconduct: purchasers of stock and call options suffered losses, as did sellers of put options; long-only buyers sustained injury, as did short sellers who covered their positions. Regardless of investment strategy, every member of the Tesla Investor Group can point to one reason for their loss: Defendants’ series of false and misleading statements. Indeed, those losses occurred across the entire class period, not just in the first few days of activity. Accordingly, the Group provides this Court with an elegant and efficient leadership solution in this complex matter.<sup>7</sup>

<sup>6</sup> James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 100 Colum. L. Rev. 1587, 1638–39 (2006) (emphasis added); *see also, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 217–18 (3d Cir. 2001) (\$3.2 billion recovery); *In re Merck & Co., Inc. Sec., Derivative & “ERISA” Litig.*, No. 05-cv-1151-SRC-CLW, slip op. at 2, 11 (D.N.J. June 28, 2016), ECF No. 896 (\$1.062 billion recovery); *In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, No. 09 MD 2058 (PKC), 2013 WL 1558686, at \*1–2 (S.D.N.Y. Apr. 11, 2013) (\$4.25 billion recovery).

<sup>7</sup> Courts consider broad representation an important factor in evaluating lead plaintiffs in complex matters. *See, e.g., In re MGM Mirage Sec. Litig.*, No. 2:09-CV-01558-GMN, 2010 WL 4316754, at \*5 (D. Nev. Oct. 25, 2010) (appointing co-lead plaintiff who exclusively purchased debt securities “in order to ensure that all plaintiffs are adequately represented”); *In re Cable & Wireless, PLC, Sec. Litig.*, 217 F.R.D. 372, 375–77 (E.D. Va. 2003) (“exercising discretion to appoint institution co-lead plaintiff with individual investor because individual had purchased defendant issuer’s American Depositary Receipts on NYSE, whereas institution could represent

1           Movants who have among the smallest financial interests attempt to manufacture a role  
 2 for themselves by arguing that the solution to Rule 23 problems is to appoint subclasses of  
 3 investors to represent varied interests within the class. That is not the appropriate course. It is  
 4 highly unusual to appoint subclasses, particularly at the lead plaintiff phase. *See In re*  
 5 *MicroStrategy Inc. Sec. Litig.*, 110 F. Supp. 2d 427, 440 (E.D. Va. 2000). The logic is sound:  
 6 subclasses have as much if not more opportunity to undercut one another than do differently  
 7 situated parties represented as part of a single class. *In re Target Corp. Customer Data Sec.*  
 8 *Breach Litig.*, 892 F.3d 968, 974 (8th Cir. 2018). The possibility of inconsistent arguments and  
 9 conflicting evidence among subclasses serves only to minimize overall recovery. No doubt that  
 10 is why Defendants seek to divide the varied investor constituencies so they can pit them against  
 11 one another. ECF No. 105, at 2.

12           That said, although some tension among class members is natural in securities class  
 13 actions, the concerns are acute in this case: Tesla is a heavily shorted stock, so the class includes  
 14 many short sellers; the stock also has a significant number of relatively small “retail investors,”  
 15 which limits the number of large, sophisticated, “long-only” investors who would have traded  
 16 during the short class window; and because of Tesla’s high volatility and speculative nature,  
 17 many investors chose to invest through options and other derivative products. The Tesla  
 18 Investor Group was *formed* to solve the anticipated problems posed by these varying interests,  
 19 without the need for subclasses. The Group’s members—sophisticated individual and  
 20 institutional long investors; short sellers buying to cover; and options traders active in both calls  
 21 and puts—transacted and suffered losses throughout the entire class period. Only the Tesla  
 22 Investor Group has significant losses, satisfies the adequacy and typicality requirements of Rule  
 23 23, and can best manage the inherent and pronounced tension that exists among the various types

24  
 25 \_\_\_\_\_  
 26 purchasers of defendant issuer’s common stock on London Stock Exchange”); *see also In re*  
 27 *Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998); *Yousefi v. Lockheed*  
 28 *Martin Corp.*, 70 F. Supp. 2d 1061, 1071 (C.D. Cal. 1999). In addition, the geographic diversity  
 of the Tesla Investor Group “helps create balance among the demographics of the lead plaintiff  
 group members, and improves diversity of experience”—as opposed to the shallow arguments to  
 the contrary from opposing movants. *Richard NMI Bell v. Acendant Sols., Inc.*, No. CIV. A.  
 3:01-CV-0166, 2002 WL 638571, at \*5 (N.D. Tex. Apr. 17, 2002).

1 of investors that were harmed in this case. In every sense of the term, the Group is the *most*  
 2 *adequate* plaintiff.

## 3 **II. MULTIPLE MOVANTS MISSTATE BASIC FINANCIAL CONCEPTS**

### 4 **A. An Economically Sound Method of Calculating Damages Confirms That** 5 **Littleton, Bridgestone, and FNY Suffered Smaller Losses Than They Report**

6 Calculating damages in securities fraud cases can be a complex and daunting task.  
 7 Investors present data in different formats and often report hundreds of lines of trading data,  
 8 leaving the court to decipher the submissions. *See, e.g.* ECF No. 40-1, Ex. A. At bottom,  
 9 however, the law treats securities cases the same as most any tort: A proper damages analysis  
 10 seeks to place the injured party in the position it would have been in but for Defendants'  
 11 misconduct. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 872 (9th Cir. 2017) (citing  
 12 *Schneider v. Cty. of San Diego*, 285 F.3d 784, 795 (9th Cir. 2002)). If an investor buys or sells a  
 13 security at a price that is tainted by fraud, her damages are based on the difference between the  
 14 effected price and the price that would have been obtained absent fraud. *Affiliated Ute Citizens*  
 15 *of the State of Utah v. United States*, 406 U.S. 128, 154–55 (1972); *Green v. Occidental*  
 16 *Petroleum Corp.*, 541 F.2d 1335, 1341–46 (9th Cir. 1976). The most sensible way to measure  
 17 the fraud premium (or discount) of a security is to compare its market price before and  
 18 immediately after the market reacts to the truth. *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir.  
 19 2000). At most, the PSLRA allows investors to base the post-fraud price on the 90-day  
 20 arithmetic average following the corrective disclosure. *In re Mego Fin. Corp. Sec. Litig.*, 213  
 21 F.3d 454, 461 (9th Cir. 2000), *as amended* (June 19, 2000) (citing 15 U.S.C. § 78u–4(e) (1994)).

22 As some other movants have observed—but, ironically, not applied to their own data—  
 23 the price at which an investor originally transacted before a security was tainted by fraud is  
 24 irrelevant. In addition, transactions that *profit* from a fraud-tainted price must be offset against a  
 25 movants' losses. *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 101 (S.D.N.Y. 2005). Applying  
 26 those basic principles reveals that some movants have materially overstated their damages to this  
 27  
 28

1 Court (while hypocritically criticizing others for engaging in the exact same gamesmanship and  
2 manipulation). The Court should reject movants' deliberate efforts to overstate their damages.

### 3 **1. Littleton**

4 Littleton's claimed damages are vastly overstated, as he bases them in large part on  
5 options purchased months before Defendants' misstatements. There is no allegation that options  
6 prices were tainted by fraud in February, April, or June 2018, let alone in December 2017, but  
7 Littleton's calculation includes trading activity and losses from those periods. ECF No. 42-2.  
8 The price Littleton paid or received for options at those times is irrelevant. The proper inquiry is  
9 to compare the price *during* the class period to the price that would have obtained had the market  
10 known the truth. Correcting for Littleton's improper reference to pre-fraud transactions results in  
11 total damages of less than \$2.2 million—a decline of more than \$1.3 million from what he first  
12 reported.

### 13 **2. Bridgestone**

14 Bridgestone's reported damages in its opposition motion are even more misleading.  
15 Bridgestone correctly remarks that reference to pre-fraud transactions cannot form the basis of  
16 recovery under *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). ECF No. 107, at 3–  
17 4. But although it chastises movants who violate that core principle, Bridgestone fails to abide  
18 by it. Throughout its opposition, Bridgestone claims damages of \$3.9 million (ECF No. 107, at  
19 4), blatantly ignoring that it originally submitted a damages calculation of *less than \$2.3 million*.  
20 ECF No. 52-2. Perhaps unsurprisingly, the lower number is accurate based on precisely the  
21 analysis Bridgestone says is required. ECF No. 107, at 3–4. The higher figure is driven by  
22 reference to options purchased prior to the start of the class period, when no allegation of fraud  
23 existed. *Cf. id.* (citing *Dura*, 544 U.S. at 342). Bridgestone is right on the law, but it is wrong on  
24 the facts it has represented to this Court.

### 25 **3. FNY**

26 FNY attempts to use its enormous volume of market-maker-like trading to establish the  
27 greatest financial interest. But when calculating losses (for the first time) in its opposition, FNY  
28

1 indulges yet another faulty methodology. It claims approximately \$300,000 of losses, based only  
 2 on the shares of Tesla it *purchased* during the class period. That ignores the shares that remained  
 3 net short at artificially inflated prices (indicating that FNY actually *sold more shares than it*  
 4 *bought* at inflated prices), which fully offset any losses. FNY points to its expenditure of \$148  
 5 million in Tesla common stock purchases during the class period, concealing the \$151 million of  
 6 simultaneous and frenetic selling activity. The net result of FNY's trading ultimately produced  
 7 \$2.9 million in proceeds. Accounting for the post-fraud price of Tesla stock, an appropriate  
 8 damages methodology produces some \$400,000 in trading *profits*. FNY plainly does not have  
 9 the largest financial interest.

10 **B. Short Sellers Are Entitled to the Fraud-on-the-Market Presumption, But**  
 11 **Tempus and OUF's Trading Activity May Subject Them to Unique Defenses**

12 Bridgestone and Johnson contend that short sellers cannot receive the presumption of  
 13 reliance under the fraud-on-the-market doctrine. ECF Nos. 107, at 4–5, 113, at 5–6. That  
 14 position flouts basic legal principles and economic common sense. The premise of their  
 15 argument is that short sellers do not rely on an efficient market because when they sell a stock  
 16 short, they believe the security's price will decline. But in that same regard, when longs buy a  
 17 stock, they believe shares will appreciate in value. Long or short, everyone who transacts in a  
 18 security does so for profit and believes the market price will move up or down over time. The  
 19 fraud-on-the-market doctrine is not predicated on the assumption that investors have no  
 20 expectation of profit. Instead, it relies on the assumption that the trading price fairly and  
 21 accurately reflects all publicly available information, thereby allowing participants to properly  
 22 assess risk and reward. As such, the presumption of reliance extends to shorts and longs alike—  
 23 a short believes the price will ultimately fall, while a long believes it will rise. *Accord*  
 24 *Schleicher v. Wendt*, 618 F.3d 679, 684–85 (7th Cir. 2010).

25 The presumption of reliance, however, can be rebutted in situations where a defendant  
 26 can establish that the plaintiff traded *irrespective* of fraud, such as when short sellers cover due  
 27 to margin calls or collateral requirements. ECF No. 108, at 16–18. For example, trades reported  
 28

1 by Tempus and OUF show irregular activity—namely, large purchases of stock at a uniform  
 2 price that suggests transactions occurred only minutes before the market closed. While not  
 3 dispositive, such behavior could indicate a forced sale rather than a conscious choice to close out  
 4 a short position. In that situation, a short seller buying to cover is subject to a unique defense  
 5 that should disqualify them as lead plaintiff.

6 By contrast, all members of the Tesla Investor Group that held net short positions have  
 7 attested they made subsequent purchases solely because of the materially false and misleading  
 8 information disseminated by the Defendants. Therefore, they cannot be subject to any unique  
 9 reliance defense that would preclude them from adequately representing the class.

10 **C. Options Traders Such as Littleton and Bridgestone Are Subject to Unique**  
 11 **Defenses and Damages Theories That Render Them Inadequate or Atypical**

12 Numerous courts have held that investors who traded purely or predominately in options  
 13 should not serve as lead plaintiff. *See, e.g., Andrada v. Atherogenics, Inc.*, No. 05CV61(RJH),  
 14 2005 WL 912359, at \*5 (S.D.N.Y. Apr. 19, 2005); *Weikel v. Tower Semiconductor Ltd.*, 183  
 15 F.R.D. 377, 391 (D.N.J. 1998); *Margolis v. Caterpillar, Inc.*, 815 F. Supp. 1150, 1156 (C.D.  
 16 Ill.1991). There are sound economic reasons undergirding that line of authority, which serve as  
 17 independent grounds to defeat Littleton’s and Bridgestone’s motions.

18 An option contract is a derivative instrument because its value is derived by reference to  
 19 a separate, underlying security. *See* Supplemental Declaration of Robert M. Daines, Wagstaffe  
 20 Decl., Ex. B, ¶ 2 n.2. For example, a call option on a stock is the right—but not the obligation—  
 21 to buy a share of the stock (and a put option is the right to sell a share of stock) at a specified  
 22 price (the “strike price”) on or before a specified time (“expiration date” or “expiry”). *Id.* ¶¶ 2–3.

23 Option pricing is more complicated than valuing stock, as multiple factors affect the price  
 24 of the instruments. For instance, part of an option’s value is inherent in its name—the property  
 25 by which a holder has the right, but not the obligation, to transact. *See id.* ¶ 2. Because they are  
 26 “options,” the time remaining until expiry is key to determining the instruments’ value. The  
 27 longer the time to expiry, the more an option is worth; as expiry approaches, the value of the  
 28

option declines. This is known as “decay” or “Theta.” *Id.* ¶¶ 3–4. There are two notable features of Theta: *first*, option decay is not linear but instead accelerates exponentially as expiry nears. *Second*, there is no accepted market signal to measure Theta; derivative investors therefore must model decay on their own, and investors’ different assumptions produce different valuations.

Those well-established principles pose fatal problems for Littleton and Bridgestone. The 10-day class window in this case saw a series of partial disclosures from Defendants, news reports from investigative reporters, and commentary from the investor community. As a result, Defendants may argue that any injured option holder during the class period should have to remove up to 10 days of Theta from their damages calculation, as that depreciation in the option’s value would have been incurred irrespective of the fraud. Importantly, considering the extensive series of options that Littleton and Bridgestone traded, the rate of decay in those options would vary widely depending on their disparate times to expiry. With no generally accepted methodology to calculate Theta, Littleton and Bridgestone could be mired in a complicated and idiosyncratic damages sideshow that would disserve the interests of the overall Class.

In addition, and unlike Tesla’s stock, a significant number of Tesla options are very thinly traded. Some of those options experienced a spike in volume in the aftermath of Defendants’ misstatements but traded very little (if at all) after the end of the class period. Littleton and Bridgestone traded several of those options series. That too has the potential to subject Littleton and Bridgestone to unique defenses. Because illiquid options are thinly traded, they may not be entitled to the presumption of reliance under the fraud-on-the-market doctrine. *See Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) (citing *Cammer v. Bloom*, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989)). And though the Black-Scholes pricing formula could be used as a means of pricing illiquid options to measure damages, Defendants could make arguments concerning the appropriate inputs to the formula: measures of go-forward volatility,

1 Theta, and abstruse concepts not fleshed out here for brevity's sake (such as Rho, Vega, and  
2 Gamma), all of which create significant risk of distraction from the core issues in this case.

3 The Court should not saddle the class with the expense, diversion, and complex analysis  
4 necessitated by appointing derivative traders as lead plaintiff.

5 **III. ALLEGATIONS OF IMPROPRIETY AGAINST MEMBERS OF THE TESLA**  
6 **INVESTOR GROUP DO NOT BEAR ON THEIR FITNESS TO SERVE**

7 Tempus and OUF, Bridgestone, and David oppose the adequacy of Mr. Left and Mr.  
8 Boutin to serve as class representatives in this litigation in light of past conduct in unrelated  
9 matters. Those past infractions, however, were isolated incidents, were not inherently  
10 fraudulent, and did not involve breaches of fiduciary duties.

11 Isolated findings of wrongdoing by a regulator are insufficient to support a finding of  
12 inadequacy. *In re Leapfrog Enters., Inc. Sec. Litig.*, No. C-03-05421 RMW, 2005 WL 3801587,  
13 at \*4 (N.D. Cal. Nov. 23, 2005). In fact,

14 issues relating to credibility do not automatically result in inadequacy of a class  
15 representative; rather, lack of credibility renders a class representative inadequate  
16 “only where the representative’s credibility is questioned on issues directly  
relevant to the litigation or there are confirmed examples of dishonesty, such as a  
criminal conviction for fraud.”

17 *Senne v. Kansas City Royals Baseball Corp.*, 315 F.R.D. 523, 570 (N.D. Cal. 2016) (quoting  
18 *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010)); *see Harris*, 753 F.  
19 Supp. 2d at 1015–16 (finding that while there were “credibility problems” with the proposed  
20 class representative, the “credibility problems [were] not directly relevant to the claims” and did  
21 not impact adequacy (emphasis omitted)).<sup>8</sup>

22 Opposing movants fail to provide sufficient facts to warrant disqualification of Mr. Left  
23 or Mr. Boutin. They raise two points about Mr. Left. *First*, they contend he was barred from  
24

25 <sup>8</sup> *See also Levie v. Sears, Roebuck & Co.*, 496 F. Supp. 2d 944, 950–51 (N.D. Ill. 2007)  
26 (appointing as lead plaintiff a day trader who had been sanctioned by the National Association of  
27 Securities Dealers for engaging in deceptive stock transactions and who had failed to disclose  
28 that fact in discovery); Newberg on Class Actions § 3.68 (5th ed. 2015) (noting that “[m]ost  
courts have rejected the contention that a proposed representative is inadequate because of prior  
unrelated unsavory, unethical, or even illegal conduct”).

1 membership in the National Futures Associations (“NFA”) for “false and misleading statements”  
 2 while “working at Universal Commodity Corporation” ECF No. 107, at 17. In reality, Mr. Left  
 3 joined Universal as a 23-year-old and quit after only nine months. The NFA ruling did not  
 4 specifically target Mr. Left but was against *all* current and former employees on a firm-wide  
 5 basis. ECF No. 109-10. *Second*, movants say Mr. Left was “banned from trading” on the Hong  
 6 Kong market for five years due to alleged misconduct in connection with a published market  
 7 report. *See* ECF Nos. 107, at 17, 111, at 3, 115, at 8. In that case, Mr. Left was punished for  
 8 public market commentary and vehemently denied wrongdoing. In the wake of the ruling, Hong  
 9 Kong-based investors and analysts raised concerns over the implications for freedom of opinion,  
 10 arguing that the ruling would “strangle negative commentary about the city’s markets.”<sup>9</sup> Mr.  
 11 Left was in good company: in a substantially similar ruling, Hong Kong’s securities regulator  
 12 subjected Moody’s Corporation, a U.S. financial services company, to a fine and reprimand for a  
 13 published report, finding that freedom of expression is “not absolute.”<sup>10</sup> Not only would that  
 14 incident be unlikely to arise in the United States, but the underlying facts are unrelated to the  
 15 pertinent facts in this litigation. In addition, Tempus and OUF oppose the adequacy of Mr.  
 16 Boutin based on fines imposed by the Autorité des Marchés Financiers for “insider trading.”  
 17 ECF No. 115, at 8. Mr. Boutin’s alleged conduct, however, is an aberration from his lengthy  
 18 investing track record, occurred more than a decade ago, and did not involve a finding of  
 19 dishonesty or a breach of any fiduciary duty.

20 As a fiduciary for the class, the lead plaintiff serves to “advance and protect the interests  
 21 of those whom he purports to represent; their interests are entrusted to the fiduciary’s diligence  
 22 and successful protection of the class depends upon the named plaintiff.” *In re Peregrine Sys.*  
 23 *Sec. Litig.*, No. CIV. 02 CV 870-J(RBB), 2002 WL 32769239, at \*8 (S.D. Cal. Oct. 11, 2002)

24  
 25  
 26 <sup>9</sup> *Hong Kong bans short-seller Andrew Left from market for five years*, SOUTH CHINA  
 MORNING POST, <https://www.scmp.com/business/article/2038381/hong-kong-bans-short-seller-andrew-left-market-five-years> (Oct. 19, 2016).

27 <sup>10</sup> *See* Eduard Gismatullin, *Hong Kong SFC Argues Free Speech Is Limited in Andrew Left*  
 28 *Case*, BLOOMBERG QUINT, <https://www.bloombergquint.com/china/hong-kong-sfc-argues-free-speech-is-limited-in-andrew-left-case#gs.HlgNwAQ> (June 10, 2016).

(quoting *Landry v. Price Waterhouse Coopers Chartered Accountants*, 123 F.R.D. 474, 477 (S.D.N.Y. 1989)).<sup>11</sup> Here, unlike Tempus and OUF’s founder and owner Daniel Dantas—who has a consistent, 20-year history of misconduct—none of the transgressions attributed to Mr. Left or Mr. Boutin involved breaches of fiduciary duty. As detailed in the Group’s opposing brief (ECF No. 108), notorious “bad boy” Dantas has a lengthy civil and criminal record that includes corporate espionage, money laundering, tax evasion, breaches of contractual and fiduciary duties, and self-dealing. *Cf. In re Leapfrog Enters.*, 2005 WL 3801587, at \*4. By contrast, the isolated incidents involving Mr. Left and Mr. Boutin are not “so sharp as to jeopardize the interests of absent class members” or otherwise render them unsuitable to represent the Class. *Harris*, 753 F. Supp. 2d at 1015–16.<sup>12</sup> Thus, while acknowledging Mr. Left and Mr. Boutin’s past incidents, the Tesla Investor Group submits that they are different in kind from the pervasive and more serious transgressions that plague Dantas’ record.<sup>13</sup>

#### IV. EVEN EXCLUDING MSSRS. LEFT AND BOUTIN, THE TESLA INVESTOR GROUP IS STILL SUPERIOR AS LEAD PLAINTIFF

If this Court finds one or more members of the Tesla Investor Group to be improper, the Court has inherent power to appoint individual members of the Group to serve as lead plaintiff.

<sup>11</sup> See also *In re Surebeam Corp. Sec. Litig.*, No. 03 CV 1721JM(POR), 2004 WL 5159061, at \*7 (S.D. Cal. Jan. 5, 2004) (“courts have found that an individual is an inadequate lead plaintiff due to unrelated misconduct which implicates the individual’s ability to serve as a fiduciary” (emphasis added)). In *Surebeam*, the court declined to appoint a lead plaintiff candidate who was named in more than 60 complaints to securities regulators. *Id.*

<sup>12</sup> See also *Wood v. Capital One Auto Fin., Inc.*, No. 06-CV-7, 2006 WL 6627680, at \*4–7 (E.D. Wis. Sept. 19, 2006) (finding a 16-year old conviction for misappropriating company funds that “has no relation to this case” to be irrelevant because “there has been no subsequent conduct to suggest that Wood lacks the personal qualities necessary to represent a class in this civil suit”); *Hall v. Nat’l Recovery Sys. Inc.*, No. 96-132-CIV-T-17(C), 1996 WL 467512, at \*5–6 (M.D. Fla. Aug. 9, 1996) (pattern of prior misconduct by proposed class representative raised concerns about reliability and conscientiousness, justifying denial of class certification).

<sup>13</sup> Bridgestone further alleges that Mr. Left’s “new long position” in Tesla securities is detrimental to the class of short sellers, subjecting him to unique defenses and thus rendering him inadequate to represent the class. ECF No. 107. That argument is without merit. Courts routinely reject the argument that post-class period investments render an investor atypical of the Class. See *McGuire v. Dendreon Corp.*, No. C07-800MJP, 2008 WL 418122, at \*2 (W.D. Wash. Feb. 13, 2008) (“Courts have repeatedly rejected the argument that a plaintiff’s post-class period transactions in a defendant company’s securities are inconsistent with a claim of fraud or raise questions as to the plaintiff’s adequacy and typicality.”); *Dietrich v. Bauer*, 192 F.R.D. 119, 125 (S.D.N.Y. 2000) (finding proposed class representative typical despite continuing to purchase after dissemination of negative publicity).

1 Indeed, a “group vying for lead plaintiff status does not necessarily rise and fall as a group. *In re*  
 2 *Cardinal Health Sec. Litig.*, 226 F.R.D. 298, 308 (S.D. Ohio 2005) (citing *Surebeam* 2004 WL  
 3 5159061, at \*7). “In fact, courts in this circuit routinely break apart a proposed group in search  
 4 of the most adequate plaintiff.” *Surebeam*, 2004 WL 5159061, at \*7 (collecting cases).

5 Assuming *arguendo* that either Messrs. Left or Boutin do not satisfy Rule 23’s adequacy  
 6 requirements—which the Group vigorously disputes, as discussed above—it is within the  
 7 Court’s power to modify the Group’s composition and allow the remaining members to proceed.  
 8 *See id.* at \*8.<sup>14</sup> Absent Mr. Left, the Group would have nearly \$2.9 million in losses; absent Mr.  
 9 Boutin, it would have approximately \$3.9 million in losses. Each of those figures standing alone  
 10 represents the largest financial interest aside from that of Tempus and OUF, which, as detailed in  
 11 the Group’s opposition brief (ECF No. 108), are inadequate and atypical for multiple,  
 12 independent reasons. In the event both Messrs. Left and Boutin are excluded, the remaining  
 13 three members of the Group still have nearly \$2.2 million in losses—far greater than any other  
 14 movant that complies with Rule 23.

15 Moreover, even without Messrs. Left and Boutin, the Group would comprise a long-only  
 16 purchaser, short sellers that bought to cover, a sophisticated institution, and those that transacted  
 17 in options. It is undisputed that Dr. Shirazi is the largest long-only purchaser and is not subject  
 18 to unique defenses. In addition, PROtecto and Vilas Capital are large, sophisticated short sellers  
 19 that no competing movant can attack as inadequate or atypical.<sup>15</sup> Accordingly, there is no sound  
 20 reason to choose plaintiffs with smaller financial interests over individual Group members with  
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 22

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23 <sup>14</sup> See also *In re Regions Morgan Keegan Closed-End Fund Litig.*, No. 07-02830, 2010 WL  
 24 5173851, at \*10–11 (W.D. Tenn. Dec. 15, 2010) (removing one group member upon finding  
 25 unique standing defense and appointing remaining group members as lead plaintiff); *In re*  
 26 *Cardinal Health*, 226 F.R.D. at 307–09 (allowing segmentation of proposed group where two  
 members would be subject to unique defenses; appoints altered group as lead plaintiff upon  
 finding that opposing movant with resultantly larger financial interest also subject to unique  
 defenses).

27 <sup>15</sup> David’s offhand opposition to Vilas Capital’s standing is without merit. Vilas Capital’s  
 28 certification was signed by its Chief Executive Officer and Chief Investment Officer, John C.  
 Thompson, who had authority to act on its behalf (*see* ECF No. 51-4, at 3)—authority none of  
the other competing movants disputes.

1 larger losses when each member of the Tesla Investor Group is ready and able to serve as lead  
 2 plaintiff—in the event the Court decides that the collective Group, as comprised, is improper or  
 3 that subclasses would better protect the interests of injured investors.<sup>16</sup>

4 **V. IF ANY LAW FIRM HAS A DISQUALIFYING CONFLICT OF INTEREST, IT IS**  
 5 **ROBBINS GELLER, NOT LABATON SUCHAROW**

6 The argument by Tempus and OUF that Labaton Sucharow has a disqualifying conflict of  
 7 interest is unavailing. *See* ECF No. 115, at 8–10. Labaton Sucharow was one of many law firms  
 8 involved in an unrelated derivative action against Tesla’s board of directors. Labaton Sucharow  
 9 played a tertiary role at best and has since withdrawn from the case with its clients’ consent. *See*  
 10 ECF No. 116-6; *see also In re Tesla Motors, Inc. Stockholder Litig.*, C.A. No. 12711-VCS (Del.  
 11 Ch.). That eliminates any potential conflict. To the extent there is any conflict, it would affect  
 12 only David’s proposed lead counsel, Robbins Geller, which is serving as co-lead counsel in the  
 13 derivative action. *See* ECF No. 116-4. Upon a determination that David and Tesla have adverse  
 14 interests, Robbins Geller would be subject to disqualification for simultaneously representing  
 15 both clients. *See Flatt v. Superior Court*, 885 P.2d 950, 954–56 (Cal. 1994).

16 **CONCLUSION**

17 For all the foregoing reasons, the Tesla Investor Group respectfully requests that the  
 18 Court grant its motion and deny all competing motions.

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 27 <sup>16</sup> Indeed, should the Court determine that subclasses are advisable, the Group’s remaining  
 28 members are ideal candidates for the long-only and short-seller subclasses. *See In re Literary  
 Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249–50 (2d Cir. 2011); *see also* ECF  
 Nos. 113 at 7–8, 117, at 4.

1 DATED: October 30, 2018

Respectfully submitted,

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